IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.439 OF 2005

M/s.Vazir Surface Protection
Pvt.Ltd. ..Petitioners.

Vs.

Employees Provident Fund
Organisation & Ors. ..Respondents.

....

Mr.J.P.Cama with Mr.V.P.Vaidya for the Petitioners.
Mr.Suresh Kumar for the Respondents.

....

CORAM : DR.D.Y.CHANDRACHUD, J.

28th March, 2005.

P.C. :

1. Rule, made returnable forthwith by consent. Counsel appearing on behalf of the Respondents waives service. By consent taken up for hearing and final disposal.

2. The Petitioner is a company incorporated under the provisions of the Companies Act, 1956 and according to it, it has been engaged in a business

of undertaking the painting of buildings and of residential and commercial premises. On 10th October, 1995 a notice was issued to the Petitioner stating that its establishment fell for classification under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 under the scheme head 'Engineers and Engineering contractors'. Thereafter, after a lapse of two years, on 3rd October, 1997 the Petitioner was called upon to submit returns in the forms stipulated in the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Similar notices came to be issued thereafter. On 5th November, 1999 the Petitioner responded by stating that the Company could not be classified under the head 'Engineers and Engineering contractors'. According to the Petitioner, its establishment was situated in the heart of a commercial area in premises not exceeding 300 sq.ft. and no machinery or equipment was being used in the establishment. The Petitioner disputed the classification of the establishment as 'Engineers and Engineering contractors'. This was again reiterated in a letter dated 17th November, 1999.

3. On 18th January, 2000, the Petitioner was issued a letter by the Respondent - authorities in which a stand was taken that from the documents it appeared that the activities carried out by the establishment of the Petitioner would fall under the heading 'Building and Construction'. On 3rd July, 2003 an order was passed by the Assistant Provident Fund Commissioner noting that though the establishment of the Petitioner was provisionally covered under the head 'Engineers and Engineering contractors' with effect from 31st January, 1991, that position had been reviewed on the documents submitted by the establishment and it was found that the establishment would fall for classification under the head 'Building and Construction'. The order dated 3rd July, 2003 mentions that the establishment had submitted copies of certain bills for work executed by it for organization such as the I.I.T. Mumbai, for Architectural Consultants, Hindustan Lever Ltd. and the American Consulate. The order recorded that the Petitioner in a letter dated 5th August, 2002 had submitted that the evidence produced showed that its work related to the painting of buildings and could not be covered under the scheme

head 'Building and Construction'. The Assistant Provident Fund Commissioner was of the view that the head 'Building and Construction' would have to be construed liberally and not merely to include those contractors who were exclusively engaged in the construction of buildings. The head, it was held, covered all establishments engaged in the building and construction industry. Reliance was placed on the Memorandum and Articles of Association of the Petitioner and on the reply of the Petitioner to a questionnaire in which it was stated that the Petitioner has carried on the business of painting and repair contractors.

4. After the aforesaid order dated 3rd July, 2003 proceedings took place under Section 7-A upon which an order of assessment was passed on 5th April, 2004. The Petitioner filed an application for review which was dismissed on 15th October, 2004. It may be noted that in an order dated 5th April, 2004 passed by the Assistant Provident Fund Commissioner, once again a reference to the establishment of the Petitioner as an establishment of engineers and engineering contractors is made, though before the Court it has been stated that

this is an inadvertent mistake. The Petitioner had moved an appeal against the order dated 3rd July, 2003 seeking to cover the company as an establishment in the building and construction industry, but the appeal was dismissed by the Appellate Tribunal on the ground that it had been barred by limitation since the Tribunal, under Rule 7(2) did not have the power to condone a delay in excess of 60 days.

5. Counsel appearing on behalf of the Petitioner submitted that the Provident Fund authorities were unsure of the appropriate classification and coverage in respect of the Petitioner under the provisions of the Act. Initially the classification was sought to be effected on the ground that the Petitioner could be classified under the head 'Engineers and Engineering contractors'. This was on 10th October, 1995, with effect from 31st January, 1991. However, in January 2000 the basis of classification was sought to be altered and coverage was sought to be made under the head 'Building and construction'. Counsel for the Petitioner submitted that the expression 'building and construction' must be

construed to include those establishments which are involved in the construction industry and the nature of the work of the Petitioner would clearly show that the company is not a part of the construction industry. Moreover, it was submitted that records were produced before the Provident Fund Commissioner which has been adverted to in the order dated 3rd July, 2003. The bills relating to work which has been performed showed that the nature of the work of the Petitioner related to the painting of buildings only.

4. Upon hearing counsel appearing on behalf of the Petitioners and the Respondents, it is evident that the Provident Fund authorities have not been consistent on the question of the coverage and classification of the establishment of the Petitioners. Initially the establishment was sought to be classified as 'Engineers and Engineering contractors', by an order dated 10th October, 1995. On 18th January, 2000 the Petitioner was, however, informed that the establishment fell for classification under the heading 'Building and construction'. The Petitioner disputed that classification. The

Assistant Provident Fund Commissioner has relied upon the Memorandum and Articles of Association of the Petitioner and upon the replies furnished by the Petitioner to a questionnaire. The questionnaire which is annexed at Exh.1 to the affidavit in reply inter alia requires a disclosure of the nature of business to which the Petitioner answered by stating that the company is engaged in the business of painting and repair contractors. The classification for the purposes of the provisions of the Act cannot be made hypothetically, based upon all the possible objects which a company can pursue in its Memorandum of Association. The authority has to apply its mind specifically to the question as to whether the business that is carried on by the establishment falls in one of the heads covered by the Act and the scheme. In a matter such as the present, the basic question which does arise is as to whether the nature of the business as is pursued by the Petitioner would fall for classification as that of "Building and Construction". I am of the view that having regard to the ramifications which are involved in such a determination, not merely for the Petitioners but other like establishments as

well, it would only be appropriate and proper if the issue as regards the applicability of the provisions of the Act is reconsidered by the Provident Fund authorities. The submissions which have been urged by the Petitioner do warrant a careful application of mind, something which it is necessary for the authorities to determine upon a consideration of all the relevant material. In order to enable the authorities to do so the impugned orders dated 3rd July, 2003, 5th April, 2004, 15th October, 2004 and 31st January, 2005 are quashed and set aside. The Petitioner shall appear before the First Respondent on 19th April, 2005 on which date the Petitioner shall file its reply together with such documentary material as the company may seek to rely upon in support of its case relating to coverage under the provisions of the Act and the scheme. The Petitioner shall co-operate with the authorities and produce all further material and information which the authorities require for a proper determination. The authority shall after affording to the Petitioner a reasonable opportunity of being heard in the matter pass an order determining the coverage of the Petitioner for the purposes of the

Act and the schemes thereunder, preferably on or before 30th June, 2005.

5. In the event that the Petitioner is held to be governed by the provisions of the Act and the schemes, the Petitioner shall further co-operate with the authorities in furnishing all the relevant information in order to enable the authorities to conclude the process of assessing the liability of the Petitioner under the law.

6. The Petition is accordingly disposed of. There shall be no order as to costs.

-